

1 THE HONORABLE JOHN C. COUGHENOUR
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
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15 SHIRLEY DEROUIN and KENNETH
16 DEROUIN, husband and wife, and the marital
community composed thereof,

17 Plaintiffs,

18 v.

19 KENNETH L. KELLAR TRUCK LINE,
20 INC, a Washington Corporation, and DION
21 WILLIAM TORRIES and JANE DOE
22 TORRES, husband and wife, and the marital
community thereof,

23 Defendants.

24 Case No. C08-1049-JCC
25 ORDER

26 This matter comes before the Court on Defendants' objection to Plaintiffs' attempt to
admit evidence of Defendants' subsequent remedial measure, namely, Defendants' later
decision to allow messengers to stand outside the armored truck to assist with reversing the
vehicle. The Court sustained the objection. Plaintiffs' filed their opposition (Dkt. No. 91), and
Defendants similarly filed their position (Dkt. No. 92). Having thoroughly considered the
parties' positions and the relevant record, the Court maintains sustaining Defendant's
objection.

Federal Rule of Evidence 407 generally provides that evidence of a subsequent

remedial measure is inadmissible to prove negligence. Rule 407 includes an exception, however, when the evidence is offered to prove “feasibility of precautionary measures, if controverted.” Plaintiffs contend that Defendants have placed feasibility in issue by alluding to a company policy that precluded truck messengers from exiting the truck to assist in its maneuvering. (Dkt. No. 91 at 2). Defendants have not placed in issue the feasibility of such conduct. *See Gauthier v. AMF, Inc.*, 788 F.2d 634, 638 (9th Cir. 1986) (“[W]here a defendant argues about the trade-offs involved in taking precautionary measures, it is not placing feasibility in issue.”); 1 Michael H. Graham, *Handbook of Federal Evidence* § 407:1 (6th ed. 2010). Moreover, the Court excludes the evidence under Rule 403, finding that the probative value, if any, is substantially outweighed by the danger of unfair prejudice and that admission may mislead the jury. *See Fed. R. Evid. 407* advisory committee’s note.

DATED this 4th day of November, 2010.

John C. Conner

John C. Coughenour
UNITED STATES DISTRICT JUDGE